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In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

PETITIONER,

V.

JOHN ARTHUR SCOTT,

RESPONDENT.

No. 76-1382

Washington, D. C.
February 21, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 76-1382
JOHN ARTHUR SCOTT, Respondent.	:	

Washington, D. C.

Tuesday, February 21, 1978

The above-entitled matter came on for argument at 10:10 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

WILLIAM C. MARIETTI, ESQ., 820 Terrace at Clay, Muskegon, Michigan 49440, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear first this morning Number 76-1382, United States against Scott.

Mr. Frey, you may proceed whenever you are ready.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit dismissing the Government's appeal in this case which was taken from an order of the District Court which dismissed Count I of the indictment against Respondent on grounds of prejudicial pre-indictment delay.

The relevant facts are simple and may be summarized briefly. In March 1975, Respondent was charged in a three-count indictment with distributing controlled substances on three separate occasions, cocaine on September 20, 1974, codeine on September 24, 1974, and heroin on January 22, 1975. He moved before trial to dismiss the first two counts on due process grounds, alleging prejudicial pre-indictment delay. The motion was denied with the proviso that it could be renewed after presentation of evidence at trial. It was renewed and again denied at the close of the prosecution's case, at which time a motion for a judgment of acquittal was also denied, the

court indicating that the prosecution had put on enough evidence to take the question of Respondent's guilt or innocence to the jury. The pre-indictment delay motion was again renewed after the defense had rested and this time it was granted. The United States then sought an appeal.

We are concerned here solely with the dismissal of Count I. The court granted Respondent's motion to dismiss that count on the basis of delay, finding that there had been an intentional delay by the Government in bringing the charge for the improper purpose of accumulating evidence of other crimes by the Respondent,and that the delay of five and one-half months had prejudiced the Respondent because it had interfered with his ability to recollect the events of the date on which the offense allegedly occurred.

QUESTION: Mr. Frey, Count II is entirely out of the case?

MR. FREY: Yes, we are not asking this Court to reverse the dismissal of our appeal as to Count II.

In light of this Court's subsequent decision in United States v. Lovasco, the dismissal was indisputably erroneous. The question this Court must decide is whether the United States is entitled to correction of the error by an appeal. And, of course, whether the United States can appeal depends on whether the Double Jeopardy Clause would bar a second trial of Respondent, if the appeal were successful.

Now, let me approach this question first by describing some of the legal terrain that this Court has traversed in the last several years and by positioning the present case on the double jeopardy landscape.

The issue in the present case is akin to those recently decided by the Court in cases such as Wilson, Jenkins, Dinitz, Martin Linen, Lee and Finch and which it now has before it in Sonabria. As a result of these decisions, the Court has authoritatively answered many questions. For instance, Wilson made clear that the Government could appeal a dismissal or an aquittal that followed a jury verdict of guilty when success on appeal would not require a second trial.

On the other hand, Jenkins, Martin Linen and Finch established that in most, if not all, other circumstances the Double Jeopardy clause confers upon defendants in criminal cases an interest in retaining the benefits of a post-jeopardy acquittal by either judge or jury, whether or not the acquittal is legally or factually correct. This interest precludes a Government appeal to review the propriety of such acquittals.

Dinitz and Lee, on the other hand, established that a mid-trial termination, not amounting to an acquittal on the merits, if requested by the defendant, does not bar a second trial, at least as long as the termination is of a kind that allows or contemplates the possibility of further prosecution.

QUESTION: Mr. Frey, you are not suggesting that all

of the authoritative answers, as you refer to them, that have been given by this Court to these questions are consistent with one another, are you?

MR. FREY: No, I am not, but they have at least established a group of cubby-holes in which certain situations can be placed. We know what the rules are. Unless this Court is prepared to re-examine any of the cases -- I think there is some inconsistency in rationales, but nevertheless some clear strains of decision or lines of policy that I will attempt to elucidate that shed considerable light on the proper outcome of this case.

This case falls in an as yet unexplored middle ground. On the one hand, it plainly does not involve an acquittal under any acceptable definition of the term. Unlike Jenkins, unlike Martin Linen, unlike Finch, there was here no determination that Respondent did not commit the offense that he was charged with. Nor was there a resolution in Respondent's favor of any facts relating to the question of guilt or innocence. There may be cases, such as Sanabria, in which it is difficult to tell whether there has been an acquittal, but this is not such a case.

Instead, there was here simply a determination that, regardless of Respondent's guilt or innocence, wholly independent factors preclude his conviction.

QUESTION: How was it denominated by the District

Judge?

MR. FREY: It was a dismissal.

QUESTION: Dismissal or the grant of a motion to dismiss and a dismissal.

MR. FREY: I believe that's correct.

QUESTION: I think it was just a dismissal. It didn't say "motion," I don't believe, did it?

MR. FREY: Well, there was a motion which was made prior to trial --

QUESTION: But I mean his statement was just a dismissal, wasn't it?

MR. FREY: It was a dismissal of the indictment, which would be the proper remedy if the legal grounds were correct.

Thus, the case is holding then an acquittal may not be reviewed on appeal where a second trial would result from a reversal are not controlling here. On the other hand, this case is not necessarily controlled by the mistrial dismissal cases, such as Dinitz and Lee. Those cases can be distinguished from this case on the ground that there the termination of the first trial did not result from a ruling that, if correct, would bar further prosecution of the charge. Unlike what the Court was able to say in Lee, the Court could not say here that the ruling of the District Court was the functional equivalent of a mistrial.

Nevertheless, we submit that the instant case is markedly closer in almost all material respects to the mistrial dismissal line of cases than to the acquittal line, and, accordingly, that the Government's appeal and the ensuing retrial if the appeal succeeds, are not barred by the Double Jeopardy Clause.

Now, I would like to turn to a consideration of the relevant double jeopardy policies in an attempt to demonstrate why those policies are served rather than offended by allowing the Government's appeal in this case.

The history of the Court's double jeopardy jurisprudence reflects a continuing effort to strike an appropriate balance between competing interests, on the one hand, the interests of society in conducting fair trials ending in just judgments which subsumes the societal interests that the guilty should be punished for their crimes, on the other hand, the interests of the individual to be sheltered from the anxiety and expense of multiple trials to avoid multiple punishments for a single offense and to preserve a determination at trial that he is not guilty of the offense charged.

None of these interests is absolute. Thus, society's interest in legally just and factually accurate trial outcomes is required to yield to the double jeopardy interests of an acquitted defendant, even though the acquittal may, for instance, be the product of a palpably erroneous jury

instruction. On the other hand, whatever interests the defendant has in preserving an acquittal must yield in situations like Wilson or like Serfass where he has not yet been placed in jeopardy when the acquittal occurs.

As to the central double jeopardy interests of the defendant in avoiding multiple trials, it is well settled that that interest, too, must give way in at least three types of circumstances. The first is where the defendant has been convicted and the conviction is reversed or set aside subsequently. The second is where as a result of prosecutorial or judicial error the defendant elects to move for a mistrial that terminates the first trial. And the third is where the trial is terminated even over the defendant's objection because circumstances make such termination manifestly necessary.

Now, in all of the cases involving the permissibility of a second trial or of a Government appeal, the interests of the defendant that could allow him to prevail have fit within two categories.

QUESTION: When you speak of the manifest necessity doctrine, is that not coupled with the interests of justice both to the public and the accused?

MR. FRLY: Yes, of course, it's the --

QUESTION: Balancing process, isn't it?

MR. FRLY: Yes, it is a balancing process, and the point I was attempting to suggest is that the interest in

avoiding multiple trials is not absolute. It requires a balance of the societal interest in public justice against the individual interest in avoiding repetitious litigation. And the manifest necessity termination is an effort to strike that balance in a situation where the trial has had to terminate because of a hung jury or acts of war, as in Wade v. Hunter, and in other circumstances that are justifiable to override the defendant's right in avoiding multiple trials.

I gather you decided a case this morning that involves that very question.

If I could come back to the concept that there are two kinds of interests of the defendant which, I think, it can be shown are not -- neither of which is implicated in this case. The first interest which was deemed controlling in Ball, Kepner, Jenkins, Martin Linen, Finch is the interest in preserving an acquittal if the defendant is able to obtain one. Now, as I've indicated, that interest is not at all involved in this case, since Respondent most definitely was not exonerated of the charge of cocaine distribution.

The second interest, which is central to the mistrial dismissal line of cases and which prevailed in such cases as Downum and Jorn, is the valued right of the defendant to obtain a verdict at the first trial, if he wants one. Cases implicating this interest -- such factors as whether the defendant has agreed to the termination of the first trial and if he has

resisted it to whether the termination was nevertheless necessary to serve the ends of public justice.

If, as in Dinitz and Lee, he has sought the preverdict termination, it is difficult to conclude that a second trial should be barred on the grounds of an unjustified deprivation of the defendant's right to obtain a verdict at the first trial.

Now, Respondent Scott, like Dinitz and Lee, did not have his right to settle his dispute with society once and for all at the first trial taken away from him. He could have had a verdict, but he preferred instead a termination on a ground unrelated to his guilt or innocence.

Since the appeal does not --

QUESTION: Could I interrupt?

MR. FREY: Sure.

QUESTION: There are two interests, one to preserve the interest in the acquittal and the second is to go to the jury in the first trial. The second point you say is not --

Why isn't the interest in preserving an acquittal very similar to the interest defendant might have if, say, there were an appeal on final judgment entered here? If there had been an appeal and we said you could appeal and then it was finally judged that the trial was too late, he couldn't be retried then either. Why isn't it the same --

MR. FREY: The principle of res judicata --

QUESTION: Isn't that principle of res judicata part of what the Double Jeopardy Clause protects?

MR. FREY: I would agree that it's an important part of what the Double Jeopardy Clause protects, but it simply is inapplicable where you have an appeal.

QUESTION: Let me put it a little differently. You say the first interest is in preserving an acquittal. Why doesn't the defendant have an interest in preserving any favorable resolution of the trial after he has been put in jeopardy?

MR. FREY: Well, the question is whether he has an interest that this Court has recognized or is now prepared to recognize should override the societal interest in correcting error and in obtaining a determination of his guilt or innocence. After all, the principal purpose of the trial itself on which the Double Jeopardy Clause focuses is to secure a determination, accurate if possible, of the defendant's guilt or innocence. When there has been a determination that he is not guilty, this Court has taken the view -- last term in Martin Linen and in Finch -- that that determination vests in the defendant an indefeasible interest that the Government can't attack. It has nothing to do with res judicata, it seems to me, because we cannot appeal, we cannot seek review of errors that may have underlain the acquittal. But I think the reason that has a special status is because it is a determination that the

defendant is not guilty. And I think that the Court has come to the conclusion that that kind of determination is something that the Court is not prepared to see attacked in the means that would require a second trial.

QUESTION: Perhaps that's right, but is it not correct that the defendant does have an interest at least in preserving a favorable judgment, even though it's not a determination of innocence?

MR. FREY: I don't question that he has an interest, but I think it is clear --

QUESTION: It's not constitutionally protected, is what you are saying?

MR. FREY: Well, it is clear from the Wilson case that the interest in preserving the favorable judgment is not, itself, constitutionally protected by the Double Jeopardy Clause, because in Wilson the defendant got the very same kind of ruling that this defendant got here, and --

QUESTION: After a verdict of guilty.

MR. FREY: After a verdict of guilty. But he had the same interest in preserving it from attack on appeal, yet the Court allowed the appeal because it was concerned with multiple trials and not the right to preserve a favorable ruling. And there is some discussion of the Court's opinion in Wilson which indicates that --

QUESTION: His interest there was in not being tried

twice. And here, if you prevail, he will be tried twice.

MR. FREY: I intend to discuss the reasons why his interest in not being tried twice is no different from Lee's interest in not being tried twice.

There are two separate interests that you mention. One is the interest in preserving a favorable decision. As to that interest, I maintain -- and I think the Court's decisions, particularly Wilson, support me -- that that interest applies to acquittals in a different way from the way it applies to other kinds of favorable rulings.

As to the interest in avoiding multiple trials, that is always an interest of a defendant, and that's an interest in the mistrial situation, that's an interest in the Lee dismissal situation, that's an interest in this situation. What I am suggesting is that it is not an interest of sufficient force to override the public interest in having won determination of the defendant's guilt or innocence.

Now, while this case is technically distinguishable from Lee on the basis of the nature of the order terminating the prosecution, we submit that it is controlled by the same policies, and that they dictate the same result. Neither in Lee nor in this case did the defendant secure a favorable resolution on the merits that might be supplanted by a second trial. And in both cases the pre-verdict termination was in response to the defendant's own motion and with his consent.

Now, we recognize that there is dictum in Lee seemingly pointing to a different result. I refer to the following statement which appears at page 30 of 432 U.S.: "Where a mid-trial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, Jenkins establishes that further prosecution is barred by the Double Jeopardy Clause."

This was such a dismissal. But we believe that the statement in Lee which was not necessary to the Court's decision there, was never intended to govern cases such as the present one. Two reasons support this conclusion.

QUESTION: Apparently, then, Jenkins doesn't?

MR. FREY: Jenkins is not controlling here at all, because Jenkins was an acquittal, that is, Jenkins was a determination that Mr. Jenkins had not committed an offense under the Selective Service laws because Aylard was not retroactive.

Now, the first reason why the Lee dictum is not applicable here is that it was a completely accurate statement of the situation in Lee where there was no Government appeal. So that if the ruling in Lee had been a dismissal with prejudice, or a determination of the merits of the controversy, the second trial in Lee would have been barred by the Double Jeopardy Clause. Here we have a Government appeal which distinguishes the case.

QUESTION: It's the fact of the Government appeal that makes it necessary to make an inquiry into whether or not the second trial is barred by the Double Jeopardy Clause, because that is the test of whether or not the Government can appeal.

MR. FREY: I understand that there is a double jeopardy issue --

QUESTION: That's the only issue, because that's the test of whether or not the Government can properly appeal.

MR. FREY: But in Lee there was a res judicata issue that had to be answered, that is, was the decision of the District Court dismissing the indictment in Lee a final determination of the controversy that would become final by res judicata principles if there was a failure to appeal. If that was true in Lee, then a second trial would have been barred by the Double Jeopardy Clause. So that, what I am saying is that the statement in Lee can be perfectly well understood --

QUESTION: You mean here in this case, in the present case, had there been no Government appeal and the Government had simply tried --

MR. FREY: The Double Jeopardy Clause would have barred a re- --

QUESTION: Retried a felon -- Been barred by res judicata --

MR. FREY: And, therefore, a fortiori by the Double

Jeopardy Clause. So that the statement in Lee would be accurate if we had proceeded by means of a second trial rather than an appeal.

Now, apart from this point -- and I recognize that Lee cites Jenkins and Jenkins was a Government appeal case -- we think that what the Court was doing in Lee was contrasting the dismissal in Lee with the dismissal in Jenkins which was in the nature of an acquittal, that is, a determination that the defendant had not committed the crime with which he was charged. We don't think that the Court had in mind this special sub-category of cases involved in Scott, and I assume the fact that certiorari was granted is some indication that the matter was not wholly settled by the statement in Lee.

Moreover, so long as the case does not implicate a defendant's special interest in preserving a determination that he is not guilty of the offense charged, there is no good reason for distinguishing among various types of dismissals for purposes of determining the permissibility of a second trial. All dismissals that do not determine guilt or innocence ought to be analyzed in the same way.

Why should a trial court's erroneous dismissal on the grounds of pre-indictment delay, statute of limitations or discriminatory prosecution bar second trial, although a dismissal for some other defect in the indictment or the trial does not? We think there is no good reason. In either type of

case, the defendant is exposed as a result of the second trial to the same amount of added anxiety and expense and the prosecution is afforded precisely the same opportunity to improve upon its original presentation.

QUESTION: Exactly what are we talking about when we say "double jeopardy"? In this case, there is no way that this man can escape without two trials, under your theory?

MR. FREY: If we are right and if --

QUESTION: He has to have two trials?

MR. FREY: No. There is a way he can escape.

QUESTION: How?

MR. FREY: If the motion that he made and got the district court to grant was legally correct then the dismissal would be affirmed.

QUESTION: But your position is it was not correct?

MR. FREY: Well, that's right.

QUESTION: In that case, he gets two trials.

MR. FREY: That is our position and that, of course, is what happened in Lee.

QUESTION: So he gets double jeopardy.

MR. FREY: Well, that's true but, as I've tried to point out earlier in my argument, the Double Jeopardy Clause is not an absolute prohibition against two trials.

QUESTION: It is not a prohibition against double jeopardy.

MR. FREY: Well, if you want to put it that way. Indeed, this case is stronger for the Government than Lee for the very reason that you dissented from the Lee decision, because in Lee the second trial was needed, at least in part, because of the negligence of the prosecutor in framing the charge. Whereas, here, the prosecutor did nothing wrong. He brought a perfectly adequate charge and it was the Respondent, by inducing the court to commit legal error, who prevented a verdict at the first trial.

QUESTION: Could the judge have done this on his own motion?

MR. FREY: Well, he could have and --

QUESTION: That's right.

MR. FREY: -- had he done it we would have had a different --

QUESTION: That's why I said he didn't grant that motion. I think that is significant in this case.

MR. FREY: I believe that he did grant the defendant's motion. I don't believe that this is a case that can be treated like Jorn as one in which the judge suddenly pops up and stops the trial.

QUESTION: That's right.

QUESTION: My understanding of the record is that the defendant made a motion to dismiss at the outset of the trial and the trial judge reserved judgment and then he made

it at the close of the Government's case, reserved judgment, and made it at the close of the defendant's case and granted.

MR. FREY: I think technically it was denied, but it was denied with the understanding that it would be considered at a subsequent point in the trial.

QUESTION: But you really don't see that there is any material difference, whether the motion is continued or whether the motion is subsequently -- It doesn't make any difference with you?

MR. FREY: I don't think so. In this case, the judge said, "I hereby grant the motion to dismiss with respect to Count I."

QUESTION: I don't think it makes any difference in your argument.

MR. FREY: Well, it would make a difference if, as in United States v. Jorn, the judge suddenly popped up and said, "I am declaring a mistrial," and before the defendant could say anything the jurors were discharged.

QUESTION: Or if he said, "I also acquit."

MR. FREY: Well, if he said, "I acquit," then you have a different problem, but he most positively did not say it.

QUESTION: If he had said it in this case, you would be making the same argument, wouldn't you?

MR. FREY: If he said he acquitted?

I think Serfass makes it clear that the label has no

talismanic effect, but if what he did was an acquittal, that is, if what he did was a judgment, however, wrong, that the defendant had not committed the offense we would not be here today.

QUESTION: You wouldn't be here because what he did was correct.

MR. FREY: In a sense, we don't know whether what he did was correct. We believe it was incorrect.

QUESTION: You said, very early in the argument, that it was palpably incorrect. What's --

MR. FREY: In light of Lovasco.

QUESTION: Why do you say that? Because there was a finding both that this was deliberate conduct on the part of the Government and that there was resulting prejudice.

MR. FREY: Well, I understand that the ingredients of the formula were recited but the delay was the kind of delay -- five and one-half months -- which normally doesn't even trigger an inquiry and the rubric nature of the delay was the very kind of thing which is normally recognized as the core kind of appropriate delay to protect the identity of an informant, to further investigate to find out the identity of any potential confederates, the source of supply of the narcotics, and so on.

I don't want to argue at length --

QUESTION: No, because in any event, even if it was arguably correctly decided and correctly dismissed, your only

claim is you had a right to appeal. The merits of that don't really have anything to do with what is the issue now before us.

MR. FREY: That's correct.

Now, if this Court upholds the dismissal of the Government's appeal in this case, the result will be to sacrifice the societal interest in a full and fair trial reaching a just judgment, without achieving any corresponding benefits of the legitimate interests of criminal defendants. No one is asking here that Respondent choose between his right to have an adjudication of his due process claim and his right to have the merits of the charges against him determined at a single trial. Both goals could readily have been achieved by the simple expedient of deferring the ruling on the motion to dismiss until after the verdict. If that is done and the jury acquits, the matter is finished. If that is done and the jury convicts, the trial judge can then grant or deny the motion. The correctness of that ruling can be reviewed on appeal by either side, and, regardless of the outcome of the appeal, no second trial will be necessary on account of this issue.

QUESTION: Mr. Frey, before you sit down, would you tell me why Jenkins isn't controlling?

MR. FREY: Because Jenkins involved what was really an acquittal.

QUESTION: But the very last page of the opinion says

"We can't tell whether there was an acquittal or not." There was no resolution of factual issue and assuming either way there is still no appeal.

MR. FREY: But Jenkins was a case in which the reason the Court -- What the Court was dealing with was a point which I am afraid is now mooted by the Finch decision which is whether if the judge had found every fact necessary to support a conviction, and had then applied a legally erroneous theory to produce an acquittal, that acquittal or dismissal, as the judge labeled it in that case, would be reviewable on appeal.

Now, what the Court said was that it couldn't tell from the record exactly what the judge was doing, but --

QUESTION: Therefore, it didn't make any difference for the purpose of the decision, isn't that --

MR. FREY: That was because, whatever he was doing, it was a determination of the defendant's culpability, liability, for the offense charged, that is, did he or did he not commit an offense, was something that the judge determined. And there was some question as to exactly how he determined it, exactly what facts he found, but I don't think it was anything like this case, where the decision to dismiss had nothing to do with whether the defendant committed the crime. It had merely to do with whether he was prejudiced in his ability to defend, and so on. He could be guilty, he could be innocent. That was not true in Jenkins. [illegible]

QUESTION: Let me ask you one other question rather quickly. If I understand your theory correctly, you would also say the Government could appeal if the dismissal, say, were on a ground that there had been prosecutorial misconduct or something of that kind?

MR. FREY: I hate to get into that at this point.

QUESTION: I think it would follow from your theory, but on the other hand you say it could not appeal if the -- say there had been a dismissal at the close of the Government's case because the judge thought there was not enough evidence to go to the jury. You would not be able to appeal that.

MR. FREY: We take that to be the teaching of Martin Linen, yes.

I would just like to sum up the way I see the equities of the present case. It seems to me that the public has a right under the Double Jeopardy Clause to expose a defendant in a criminal case to at least one determination of guilty or innocence, and that defendants should not be permitted to defeat that important interest by injecting error into a trial, halting it short of verdict and then complaining that exposure to another trial would be unjust and excessively costly to themselves.

I would like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Frey.

Mr. Marietti.

ORAL ARGUMENT OF WILLIAM C. MARIETTI, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MARIETTI: Mr. Chief Justice, and may it please the Court:

I would like to confine my discussion with the Court this morning to rebutting the brief submitted by the Government in this case. And, as far as our positive position in this case, I would like to rely on my brief in this matter and I don't intend to reiterate that.

I think it is meet for the Court in launching a discussion in the consideration of this case to first consider what we do know about this case and what there is apparent agreement upon between both the Government and the Respondent.

Now, it is clear that this case does not fall within the ambit of the Serfass decision which is part and parcel of the trilogy which this Court recently has decided. The Wilson, Jenkins, Serfass trilogy, as the Court has referred to them, in the Lee decision.

It is clear we don't have Serfass here because we have jeopardy attaching. And I read the Serfass decision as making that determination the critical factor and the reason for the decision in Serfass to permit a retrial of the defendant.

In this case, the defendant, Mr. Scott, was put to trial both with regard to the Government's proofs and to the

defendant's proofs. And as to Count III which is not before the Court it was sent to the jury. So that jeopardy has attached under the Downum decision once that jury was impaneled, once they began to consider the evidence.

I think it is also clear that we don't have the situation that we had in Lee or the situation that the Court was concerned about in the Sisson decision, where counsel merely sat back and waited until he knew jeopardy had attached and then attempted to use the Double Jeopardy Clause as a sword -- not as a shield, but as a sword, deliberately deferred his decision to file a motion on legal grounds until after jeopardy had attached. I think the Court was quite concerned about running into that situation, and certainly in the Lee case they came very close to that situation. Counsel in that case had deferred his motion until the very morning of trial, and a motion that would require research, and he very well knew that, and that was noted by the trial judge in his opinion because he said: "Gentlemen, I am going to need time to consider this motion," and they then proceeded with the proofs.

Now, that's not the situation we have here.

QUESTION: That's a distinction all right, but there is also another distinction and that is that in Lee prosecutorial error was present and here there is no prosecutorial error. Is that not correct?

MR. MARIETTI: Well, it depends how the Court decides

to look at what prosecutorial error is. It would be my position that the prosecutor made error by delaying in bringing the indictments in this case when he had opportunity to do so.

QUESTION: Well, certainly, he had no prosecutorial error during the trial?

MR. MARIETTI: Certainly not.

QUESTION: Really, other than a verdict of acquittal, any other motion is going to be based on some sort of prosecutorial error, as Justice Blackmun described it, isn't it, prosecutorial misconduct, delay, improper search or seizures?

MR. MARIETTI: I think that is true except for the situation where, of course, the court itself makes an error. But, basically, of course, it is based on my opponent making error in the case. But I think the Lee decision also is different for an important reason and the important reason is that that prosecutorial error is capable of being corrected, if, in fact, it is error. And I don't think it was argued in that case that the prosecutor did not make error. It was clear that the prosecutor had made error. He filed defective information or indictment.

In a fantasy situation, I submit that readily lends itself to correction.

QUESTION: But it is corrected at the sacrifice of your client's interest in having his fate determined by the first jury.

MR. MARIETTI: Well, first of all, let me say I am not necessarily saying I agree with the Lee decision.

QUESTION: You don't have to agree with anything.

MR. MARIETTI: But I am saying, Justice Rehnquist, that I think we have a stronger case here for that reason, because the Lee decision did involve an error by the prosecution that could be corrected. This is not the case here.

You see, in that case, it would be simple for the prosecutor to simply file a new information, add the elements of the offense, which I believe they left out knowledge, and go back to trial. And the trial judge in that case even indicated to the prosecution that "If you had done this information properly and drafted it properly there is no question that the facts here fit the crime."

QUESTION: Well, the Government's argument here is that what it conceives as the error committed by the trial judge, too, can be corrected if it can just argue it to the Sixth Circuit on the merits.

MR. MARIETTI: With all respect, I think we are confusing the error that I am talking about. He's talking about the error made by the court in its decision on whether or not to grant a motion made during trial and whether or not to proceed with that motion at trial. That's the error he's talking about. And I am talking about the error that the prosecutor made in the Lee case which was drafting the indictment improperly, and

the error that the prosecution made in this case in the delay in bringing the charges against my client. And that delay can never be corrected.

QUESTION: Why should that be critical for purposes of double jeopardy analysis?

MR. MARIETTI: I feel it should be critical because the decision in Lee, the decision in Dinitz, which the Government in this case attempts to rely upon, seems to suggest that we somehow had a choice, we somehow determined our fate in this case, and we decided that because of the makeup of the jury, because of the way the facts had fallen in the case, somehow we opted to have this case dismissed by the trial judge.

QUESTION: Well, you did, didn't you?

MR. MARIETTI: I don't think it was that sort of situation and here is why I think it is different. I think it is different because we didn't have a tainted jury in this case like you may have had in the Dinitz decision. We didn't have a tainted jury where we were concerned with the jury somehow getting to hear evidence that they should never have heard --

QUESTION: But you preferred to have the trial judge dismiss the indictment on pre-trial delay grounds than go to the jury and have its verdict and make your motion on pre-trial delay grounds afterwards if the jury returned a verdict of conviction.

MR. MARIETTI: I preferred to have the judge decide my motion for dismissal prior to jeopardy being attached. That's when it occurred, because I filed a motion long in advance of trial of this case, in accordance with the court rule, in an effort to be diligent in properly presenting my case to the court. And the court denied that motion. They didn't just say, "We'll take it under advisement." The court said, "We deny that motion," and the reason they denied that motion is because they said, "I want to hear the evidence."

QUESTION: Well, then, there is some reason for a trial judge doing that, isn't there?

MR. MARIETTI: There certainly is. Certainly is. I don't quarrel with that. But in terms of what the defendant did in this case, in terms of choosing his own fate, I don't think it can properly be said that we so opted that own fate, in that regard, because we tried to present this case to the judge prior to this jeopardy even attaching.

I have to agree with the comments of Justice Douglas and Justice Brennan in the re-opinion, where they distinguish the situation where counsel in good faith goes to that court and says, prior to any trial or any jeopardy attaching, "May we please have a decision from this court." And if the court, nevertheless, says, "No, your motion is denied," then we have no choice. We have to be put in jeopardy. And I don't think it is fair to say that we selected our fate in that regard.

Unlike the man in Dinitz, the man in Dinitz who had already prejudicial problems with that jury in terms of his lawyer being disqualified and the jury being confronted with the situation, we don't have that situation. We don't have a situation where if you brought in a new jury that it would change our position in front of that jury. No matter how many jurors you bring into this case, our position and the facts are still going to be the same. And the pre-indictment delay is still going to be the same no matter who the jury is. And that's why this case is decidedly different, I feel, from a mistrial situation where there is prejudice or taint in that trier of fact that occurs during the trial. And that's why I feel this case is completely different.

QUESTION: Suppose you make before trial two motions, one to dismiss the indictment on the grounds that the statute is unconstitutional that purports to authorize the indictment for this client, and secondly, you had, in any event, the statute doesn't reach the facts contained in the indictment, that the statute just doesn't cover this charge. And the judge reserves both motions but during trial you renew -- you urge him to grant either one of them, and he grants one or the other or both of them. Would you be taking the same position here then?

MR. MARIETTI: As to the first motion, I would not. The reason I would not be taking the same position is that that

question does not require the judge to hear the facts of the case or to make an appropriate decision.

QUESTION: I know, but he does terminate the trial and he doesn't think that you can ever be retried.

MR. MARIETTI: But the question in that case is: Does the judge have to know the facts of the case? It seems to me the question with that type of motion is: Does the judge have to know the facts of the case in order to properly decide the question of whether or not the statute is constitutional? I don't feel the judge has to have any facts before him --

QUESTION: He thought he did. That's why he waited. He thought putting the statute in some kind of factual context would help him make up his mind on the constitutional issue. So he reserved and ultimately ruled.

MR. MARIETTI: I am not sure which decision the Court is referring to. There are a couple of decisions --

QUESTION: Very many. I am just wondering whether your position would be that there would be double jeopardy in either one or both of those cases.

MR. MARIETTI: My position would be different, and it is going to depend on whether or not the judge through his finding at that trial decides that now he is going --

QUESTION: No. You renew the motion.

MR. MARIETTI: If I renew the motion, at that point,

I think I would have to revert to my position in this case. I attempted in every way, within the court rules and within proper procedure, to bring my motion before trial and to have a determination before I was placed in jeopardy.

QUESTION: If, under a State procedure, you could make such motions during trial, and they never were made before trial, but you make them during trial, what then?

MR. MARIETTI: Well, I can see a divergence of opinion with regard to the Court on that issue. I think the Court, from what I've read --

QUESTION: And what's your opinion?

MR. MARIETTI: In my opinion, in that situation, I would still say that if I have been put to the test of the triers of fact, that if a jury has been paneled and jeopardy has been attached, and it is not a manifest necessity situation or a mistrial situation, which it clearly is not, then I would submit that jeopardy would attach.

QUESTION: Even though you are the one who urged the dismissal?

MR. MARIETTI: That's right. But I emphasize to this Court that that is not the situation that we have here. I don't think it is fair to judge me on those sort of facts because I made that motion prior to trial and I made it because that's when --

QUESTION: In my examples, if the judge said to you,

"Well, I have just been reading Supreme Court opinions and I am afraid I'd be in trouble if I granted these motions now. I am going to wait until a jury comes in with a verdict. And if the jury finds you innocent, the show is over anyway, but if it finds you guilty then I'll rule on your motion."

Then, I suppose, the decision in your favor, post-verdict, would be subject to appeal.

MR. MARIETTI: Certainly would, under the Wilson decision. I have no doubt about that. If there has been a determination by the jury that can be reinstated following an appeal, then I would have to abide by the decision of this Court in United States v. Wilson.

QUESTION: What happens if a case like this, after the evidence is all in, the judge says, "I've held this motion up. I am now ready to decide it. I am going to grant the motion because from the witnesses to this case and their demeanor on the stand it's obvious that time has interfered with their memory." That would be an entirely different case, wouldn't it?

MR. MARIETTI: I don't think it would be an entirely different case for this reason, because I think the judge did make comments to that effect. Judge Fox, in making his decision on this motion, indicated not only that my client, Mr. Scott, suffered from a problem with recall of events, he also noted that the chief witness for the Government, the

informant, Mr. Jordan, also experienced difficulties recalling the events. The judge made that part of his decision.

QUESTION: Well, I could give some respect to the second point, but some of us have tried some criminal cases and isn't it perfectly common that the defendant, quote, "disremembers"? Isn't that normal?

MR. MARIETTI: Well, I am sure I don't have the privilege that the Court has in that regard, but I certainly have been faced with situations where the defendant does not have a memory.

QUESTION: As I understand, the Government says that the fact that this went in and was carried over it really goes back to the original motion and that nothing transpired.

MR. MARIETTI: I do not believe that that part of the case is clear because the judge said in his pre-trial order, "The motion is denied."

QUESTION: That's the trouble, I think, you have. You would have the burden. If it is unclear, you might not win.

MR. MARIETTI: Well, he indicated the motion was denied, but he said in that that it was denied without prejudice.

My point in raising that part of the whole sequence of events is to point out to this Court that I am not the

counsel that you were faced with in Lee or that you were concerned with in the Sisson decision that might arise who waited, waited until I was in jeopardy to use it as a sword.

QUESTION: What if you have a motion for a directed verdict on the issue of entrapment at the close of all the evidence, something which could not possibly have come up before jeopardy attached and the judge grants that motion? Is that appealable or not under the statute making appealability dependent upon double jeopardy?

MR. MARIETTI: It would be my position on entrapment -- I am not prepared to argue the law of entrapment, of course --

QUESTION: No, right or wrong --

MR. MARIETTI: It would be my position that since facts were heard which go to the guilt or innocence of the defendant and he was put to the test, as indicated in Green and the other decisions, that that certainly would bar appeal of that. That would be my position. And that raises another point --

QUESTION: Even though there was no possibility of ever obtaining a ruling on that issue prior to jeopardy attaching, the way you say you tried to do but were prevented from doing.

MR. MARIETTI: That's right. I feel that way. If the Court is going to look at the real interests of the Double

Jeopardy Clause, as set forth in Green.

But again, I emphasize that is not the case here and that is one of the under pinnings of my whole presentation to this Court, that I didn't sit back, I didn't sit back and use this Double Jeopardy Clause as a sword. I did everything that responsible lawyering requires, in terms of bringing these motions ahead of time so that I wouldn't be placed in jeopardy, I wouldn't have to be placed in that situation. And by the time we got to trial, and we got all the way through the trial, I was forced to forego asserting a legal right.

QUESTION: Do you say that the court could have been as fully advised in responding to your pre-trial motion, without any evidence before him, as he was after he had the evidence before him?

MR. MARLETTI: Absolutely not. And I think that the Government and I are in agreement on this respect. This is a peculiar type of motion, a motion for pre-indictment delay, because it does require evaluating the prejudice to the defendant versus the intentional activities of the Government. And I think it is necessary in that situation to hear some of the facts. I understand that.

QUESTION: Do you suppose it's possible that, among other things, in postponing a ruling on the motion, the judge took into account the fact that your client was a police officer who was presumably trained to remember facts and, therefore,

this delay might be different with respect to him than for some other person not a policeman?

MR. MARIETTI: I know the judge took that into account, Mr. Chief Justice. I know that he took into account this man was involved in a number of narcotics transactions, a myriad of them in the course of his police duties, and that there was a myriad of times and dates that he was required to testify to as a police officer, let alone in defending himself. I am quite sure the judge was cognizant of that when he made his ruling in this case. I am quite sure of that, and I would agree that --

QUESTION: Then why doesn't that bring you very close to the situation that Mr. Justice Rehnquist has just postulated to you?

MR. MARIETTI: I don't see the parallel. I am afraid I don't see it.

For my return, I also have to disagree vehemently with the position that has been put forth here by the Government, this morning, which I think Justice Stevens commented on, that somehow this is not the Jenkins situation because we don't have, quote, "an acquittal," here. I think we've come to the point now where we don't get hung up on the terms, whether it is labeled a dismissal, an acquittal, or whatever. In my reading of the opinion, in Jenkins, it is that the Court was unsure. The Court was not clear as to whether or not there had been a

final resolution of the guilt of the defendant. But it seems to me that the Court was clear in the Jenkins decision that there had been a final resolution in favor of the defendant in that case, regardless of whether or not it was truly an acquittal for the failure of the prosecution to prove the element of knowledge or not. The Court said that they were unclear and for that reason it was a situation similar to those situations where you do have an acquittal, but the Court did not come out and say Jenkins was an acquittal.

And I am not here today before this Court arguing that what happened in this case was an acquittal. But certainly in this case, as was stated in the Jenkins decision, or rather the Wilson decision, by Justice Douglas in his dissent in the Wilson decision, "Certainly in that case the court in arriving at the conclusion that it did had to consider all the facts in the case, facts which bore the elements of the offense, as well as on the motion" -- in that case which was the same as in this case -- "for pre-indictment delay."

And you know there is an inescapable conclusion that follows from the argument of the Government in this case, one inescapable conclusion that the Court -- that this Court -- felt was crucial in the decision they rendered in Jenkins. And that simply is that Mr. Scott, if this Court should say there is jurisdiction to entertain this appeal in the Sixth Circuit, and if that Sixth Circuit should say that Judge was in error --

which we don't believe he was, but that's not before this Court -- Mr. Scott is going to undergo yet another trial. And that is not the situation we have in Wilson, and it is the situation we had in Jenkins.

QUESTION: Mr. Marietti, on the acquittal point, you can't get an acquittal in your case, as I see it, because if your original motion had been granted he would not have been acquitted. The indictment would have been dismissed, right?

MR. MARIETTI: That is true. I agree with that.

QUESTION: So, I mean, by your being in trial, I think, if you would win, you don't have to show an acquittal. Couldn't you make that position?

MR. MARIETTI: I take the position, Mr. Justice Marshall, that once the judge denied our motion our motion was over and we were placed in jeopardy at that point.

QUESTION: But you renewed your motion.

MR. MARIETTI: We certainly did.

QUESTION: Was it a motion to dismiss the indictment?

MR. MARIETTI: It certainly was.

QUESTION: So the motion he granted was the motion to dismiss?

MR. MARIETTI: The motion that he granted, in all fairness to the position of the Government in this case, was the motion to dismiss the case for pre-indictment delay.

QUESTION: If someone takes the position that

we are not going to bury it just on language alone, aren't you, too, in agreement that they are both the same? You don't need the word "acquittal."

MR. MARIETTI: I agree completely with that position. I think the whole Court, from what I read in the decisions, agrees with that position, that we are not going to let these matters hinge on terminology. But I do see the situation arising here that you had in Jenkins. This man is going to have to face trial again, go all the way through the trial. We didn't have a situation here where we had a short bench trial or where we had a trial that was terminated part way through the prosecution's case. Mr. Scott went through the entire trial.

QUESTION: Well, Lee was going to have to face trial again, too.

MR. MARIETTI: I understand that, but in Lee, I think, in that case, the Court took note that it was clear that the judge did not contemplate that this man could never be convicted of this offense. Because the judge said, in Lee -- in his decision, he said, "Look, the evidence of guilt is here, but their information is drafted improperly." And I think the Court in Dinitz also said the same thing because they gave the defendant an opportunity to retain further counsel in the case if he granted a mistrial. That contemplates that there is going to be another trial. And I thought what the

Court said in Lee was that if the decision rendered by the lower court was to the effect that this man can never be prosecuted for this offense, that he simply can't be convicted, in fact, in this case, if there was pre-indictment delay, then he never can be convicted of that offense. And I submit that's what this Court said and that's why this case is like the language in Lee, but different from the facts of Lee, because there is nothing that can correct pre-indictment delay. There is something that can correct an improperly drafted information. But it can never be corrected in this case and, therefore, the judge when he ruled -- and he knew that when he ruled -- was making a ruling based on an assumption that this man could never be convicted of this offense, and that's exactly what Lee seems to distinguish. It says if that's the situation we have then clearly we have a situation where the Double Jeopardy Clause will act as a shield, not as a sword but as a shield.

I see my time is approaching an end and I would just like to comment finally on the alternatives that the Government proposes in this case. And that alternative seems to be that what we should do -- what a trial lawyer should do -- is more or less sandbag the Government and wait until the case is over with and then pop all your motions, bring them out of the bag and have the judge decide them at that point in the case.

QUESTION: There would be no sandbagging in the case of waiting on a motion for pre-trial delay, would there? Since

there would be nothing that could be done during the trial but correct the Government's pre-trial delay, as you commented.

MR. MARIETTI: I would think that the Government should have some prior notice of the defendant having to present this motion or is going to present it at the conclusion of the case, because they certainly want to bring these factors out in the testimony of their witnesses.

I urge the Court not to fashion a new rule of procedure for proceeding in these cases. The Government indicated we can call it an arrest of judgment. I felt that in Justice Harlan's decision in Sisson that he clearly indicated that if you are going to get involved in deciding something that requires a decision on the facts, that goes beyond the face of the indictment, that that is clearly not an arrest of judgment. And so I can't buy the Government's arguement in this case that we could make a motion for arrest of judgment because that decision that the judge would make at the conclusion of that case would necessarily be based upon the facts.

And I submit to the Court, in conclusion, that if this Court fashions this new form of procedure for proceeding in trial courts on pre-trial motions and motions of trial, that you are going to create chaos. You are going to have judges who are put in the position that the judge was in the Lee case, with somebody running in on the day of trial and saying, "Here's my motion. Decide it now." And the judge can't

possibly do it, and the judge shouldn't be put in that position.

And I just want to conclude by saying, Gentlemen, we have not come here to use the Double Jeopardy Clause as a sword. I think that was intended as a shield by the Constitution and we have done everything we can to be certain that it would be used in that fashion. Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Frey?

REBUTTAL ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Just a couple of things, Mr. Chief Justice.

Respondent misconstrues our argument on the timing of the motion. Of course, the motion should be made in the first instance in advance of trial. But, as we argued in Lovasco, this kind of motion is best determined only after trial. Our objection is to its determination in the middle of trial, when our appeal rights are defeated -- contrary, by the way, to the policies of Rule 12(e) of the Rules of Criminal Procedure. In other words, the motion should be made before trial.

Now, Respondent wants you, of course, to look at this case from the perspective of where we stand now. He is going to have to be subjected to a second trial. But if you decide this case in the Government's favor, look at it from the proper perspective, which is at the time, at the point

in trial, when the Respondent could have a ruling on his motion. And the judge says, "I am ready to rule on your motion now." Now, Respondent has a choice in that situation. He can accept the ruling then and there, terminating the trial if it is in his favor. He simply does so at the risk that if he introduced error into the trial the Government can get it corrected and there will be a second trial.

Alternatively, he can say, without any prejudice --

QUESTION: How can you correct the delay? How can the Government correct the delay?

MR. FREY: That's a very important point.

He says there was prosecutorial error in the delay. If he is right, there will be no second trial because the Court of Appeals will affirm the dismissal. It is only if there was no prosecutorial error and no impermissible delay, and, therefore, no error that needs to be cured, except one that --

QUESTION: But do you agree that there is no way to correct a prosecutorial delay if there is, in fact, a prosecutorial delay?

MR. FREY: I agree wholeheartedly with that and that is exactly my point. If there is, in fact, an improper prosecutorial delay in this case, there will be no second trial.

QUESTION: Your point, I take it, is that the Government is entitled to have the Court of Appeals decide

whether a delay of four and one-half months -- that's what it was here in these circumstances -- is a delay warranting dismissal.

MR. FREY: Yes. I think that Respondent was entitled to have that issue decided in connection with his trial. But what I am suggesting to the Court is the decision should have been after verdict if he wanted to avoid the risk of two trials. That would have been no cost --

QUESTION: I think you are saying now what you started to say when you were interrupted. Alternative -- A defendant makes a motion, based upon unconstitutional pre-trial delay, to dismiss the indictment. You say now the judge says, "I grant your motion and I am about to dismiss the indictment." And you say the defendant shouldn't do that. He should say, "No, no, Your Honor, don't grant my motion. Let the trial go on." Can you imagine any defense counsel in the world who would do that?

MR. FREY: Absolutely. If this Court reverses in Scott, it will be clear to defense counsel that he has a choice. He can have a mid-trial ruling if the judge is willing to give him one, pre-verdict ruling, and not ever get the jury's determination of guilt or innocence.

QUESTION: But he is supposed to say, "No, don't grant my motion. I want to go on and my client may be found guilty, but don't grant my motion to dismiss even though you

want to."

MR. FREY: No, not don't grant it. He'll get it granted anyway. It's a question of when it's granted. It's a question of whether it's granted before verdict or after verdict. He should say, "Your Honor, I want to see if the jury will acquit me."

Now you may think that that's unrealistic --

QUESTION: It takes a good deal of self-restraint on the part of defense counsel.

MR. FREY: If defense counsel appreciates the possible costs in terms of a second trial -- Remember Rule 12(e) says that these kinds of motions are not to be deferred for disposition during trial, if that would compromise the appeal rights of the Government, which if we lose here it certainly would. So this kind of motion shouldn't be -- In fact, there is some question whether the judge has power to rule upon it during the trial.

QUESTION: Mr. Frey, if the Government's submission is accepted and, putting aside mistrial situations which are a little bit special, does the time at which jeopardy attaches have any further significance? You know we have a case --

MR. FREY: Yes, it has a great deal of significance under Serfass, that is, you could have an acquittal that occurs prior to trial, which is really what you had in Serfass.

QUESTION: But the time of attaching jeopardy doesn't

make any difference any more, I don't think.

MR. FREY: Well, it makes a difference with two kinds of situations. The first situation is if you have an acquittal that is reviewable if it is prior to the attachment of jeopardy. That's what Serfass held. So the time of attachment of jeopardy may be significant in relation to the time a judge makes the ruling that "I've looked at the files and it is plain to me that the defendant has committed no offense."

The second respect in which it is significant is if you have a manifest necessity case, like the issue in Crist v. Kline that got abandoned by the State. You may have had an unjustifiable mistrial declared by the court. And if that was done before the attachment of jeopardy there is no double jeopardy bar to a retrial then.

QUESTION: That's all a mistrial situation, isn't it?

MR. FREY: Well, but that's --

QUESTION: Except for Serfass the only time it makes any difference is when the question is whether there was manifest necessity for mistrial. If there is a defense, for example, of statute of limitations or entrapment, as Justice Rehnquist -- or any other defense, it could always be reviewed. It wouldn't matter if the man was in jeopardy or not.

MR. FREY: I have to say --

QUESTION: It wouldn't make it wrong, necessarily.

MR. FREY: -- if the defense was entrapment, if the

defense was what Mr. Justice White suggested, that the statute is unconstitutional, you get into very difficult questions as to whether what you have is really an acquittal, either what you have is really the kind of determination that the defendant is not guilty of a crime, which is insulated from review because of the special vested interest --

QUESTION: All I am saying is that on all those issues it doesn't matter what the time of placing a man in jeopardy -- It doesn't make any difference any more, I don't think. I may be wrong.

MR. FREY: Yes, it makes a difference because if the ruling is prior to the attachment of jeopardy then there is not even inquiry into double jeopardy. If the ruling is after the attachment of jeopardy, you have to ask yourself: in an entrapment case, it is arguable whether or not that is the kind of acquittal or dismissal going to the merits which ought to be vested with the kind of protection that the Court has given in Finch, given in Martin Linen, to those kinds of rulings. And given in Jenkins.

If what you have is, as here, a claim that, well, the defendant may be guilty, but there was discriminatory prosecution. The defendant may be guilty, but there was a violation of his right to a speedy trial. The defendant may be guilty, but there was prejudicial pre-indictment delay. Then you have a class of claims which, as I've argued and we've

argued in our brief, are not materially distinguishable in policy terms from the prosecutor drew up an improper indictment, the prosecutor introduced prejudicial and inadmissible material before the jury --

QUESTION: What if you need to know when a fact occurred to decide whether statute of limitations had run? That would be just like pre-indictment delay, I suppose. The Government could appeal it.

MR. FREY: We would take that position. I take it that my opponent is harking back to the Sisson test which was a statutory test which this Court in Wilson essentially abandoned for defining what an acquittal was. I don't think an acquittal has to do with when the evidence is heard, but what it goes to and what the basis of the judge's ruling.

QUESTION: Mr. Frey, I still don't understand your position with respect to Jenkins. You say there was an acquittal there. Well, the Court of Appeals may have said there was, but this Court didn't. This Court didn't rest its view on the fact that there was an acquittal. Said it couldn't tell. I would suppose that even if the Court had said there was not an acquittal it would have come out the same way.

MR. FREY: That's because what the Court couldn't tell was something a little different here. What the Court knew in Jenkins was that the District Court had said Aylard was non-retroactive and the defendant could not be committed of

wilfully refusing to submit to induction because of the non-retroactivity of Aylard. The Government appealed, claiming that that was legally erroneous and that we said every fact necessary to support a conviction was found.

Now, this Court said, in effect, "Let's suppose that the District Court hadn't -- Let's suppose the Government was right that if the District Court had simply rested on Aylard we could review that and reverse it." Let's suppose that, although subsequently, I think, it was held that that's not so. Then it said, "We still can't tell whether the defendant found the facts -- whether the judge," -- excuse me -- "found all the facts that were necessary to support a conviction." We are not sure whether he found that there was a knowing refusal to submit to induction.

QUESTION: And whether or not he did, the Court said further proceedings were necessary.

MR. FREY: Yes, but -- The fact that in Jenkins the Court may have said whether or not this was an acquittal, the fact that further proceedings are necessary bars an appeal, doesn't answer the question about Lee. Because in Lee and in the mistrial cases it is also true that you don't have an acquittal. You still have to make the inquiry into whether an appeal on a second trial is justified.

Now, I am suggesting that we have in this case a category of ruling which, when you look at the policies and

what we are trying to protect, is more like Lee than it is like Jenkins. And the reason that that's so is because in Jenkins it's plain that the court found the defendant hadn't committed a crime, the District Court. And the Supreme Court was saying, "Well, suppose he found out on a legally erroneous basis, suppose we could agree with the Government," and so on. But there was a finding that there was no crime.

Now, here, there was no finding that there was no crime. And we submit that that is and should be properly critical to the double jeopardy inquiry.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:18 o'clock, a.m., the case in the above-entitled matter was submitted.)